November 20. 1760.

MEMORIAL

FOR

JAMES Duke of ATHOL, Claimant on the forfeited Eſtate of *Perth*;

AGAINST

His MAJESTY's ADVOCATE.

UPON the 6th Day of *December* 1748, there was a Claim duly entered before the Court of Seſſion, in name of the Memorialiſt, ſetting forth, That *James Drummond*, late of *Perth*, commonly called *Duke of Perth*, or *John Drummond*, his Brother, were Proprietors of the Lands of *Tomknock* and *Cultranich*, which were held by them, or either of them, of the Memorialiſt, conform to the Charters granted by him or his Predeceſſors, to them, their Predeceſſors, and Authors: That the ſaid Lands were forfeited by the Attainder of the ſaid *James* or *John Drummonds*, or either of them: That the Memorialiſt was intitled to the Property of theſe Lands, in virtue of an Act made in the firſt Year of his Majeſty King *George* I. intitled, *An Act for encouraging all Superiors, Vaſſals, Landlords, and Tenants, in* Scotland, *who do, and ſhall continue in their Duty*, &c. And therefore praying, that it might be found, that the Property of theſe Lands had now returned into the Hands of him the Superior.

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To this Claim it having been objected, on the Part of his Majeſty's Advocate, *1ſt*, "That the ſame was not entered as the "Law requires, having been only made upon the Survey of "the Eſtate of *Perth*, as forfeited through the Attainder of "the ſaid *James Drummond*, who was found by the Court of "Seſſion to have died unattainted, but not entered upon a "new Survey of that Eſtate, as forfeited through the Attain-"der of the ſaid *John Drummond*, the Report of which ſecond "Survey is only dated the 24th of *October* 1749, recorded in "the Exchequer the 26th of that Month, and publiſhed and "recorded in the County-books upon the 6th of *November* fol-"lowing. *2dly*, That the Claimant could have no Title to the "Property of the Lands claimed by him, in virtue of the Act "founded upon, in regard *James Drummond* was found not to "have been forfeited; and that *John Drummond* never was Vaſ-"ſal to the Claimant, the Succeſſion only having opened to "him after his Attainder. And, *3dly*, That the Claimant had "failed to obſerve the Direction of the Clan Act; by which it "is provided, That Superiors intending to take the Benefit "thereof, ſhould, within ſix Months of the Attainder, "either infeft themſelves in the Lands claimed, or do Dili-"gence for attaining Poſſeſſion thereof:" To theſe Objections Anſwers were made on the Part of the Claimant; whereupon the Lord *Minto* Ordinary, upon the 11th of *December* 1759, made *Aviſandum* with that Debate to the Lords, and appointed Parties Procurators to prepare and print Informations *hinc inde*, in order for reporting.

Theſe Informations having been accordingly lodged, at adviſing thereof, the Court was pleaſed to appoint Memorials to be given in, particularly upon the ſecond Point. In obedience whereto, what follows is ſubmitted to their Conſideration, on the Part of the Claimant.

With regard then to the firſt of the above-mentioned Points, as the Memorialiſt apprehends, the Court was of Opinion, that that might be properly determined, upon what had been ſtated to their Lordſhips

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Lordſhips in the Informations formerly given in, he begs Leave to refer thereto, and only to add, That though the Veſting-act, in the Twentieth Year of his late Majeſty, requires all Claims upon real Eſtates ſurveyed as forfeited, in Manner mentioned in that Act, to be entered within ſix Months, from the Regiſtration of the Survey, in the Books of the County where ſuch Eſtate lies, under the Pain of being declared null and void, to all Intents and Purpoſes; yet it is not declared, by that or any other Law, that Claims may not be properly entered before the Survey of the Eſtates upon which they are made. If a Claim had been entered upon an Eſtate ſuppoſed to be ſurveyed as forfeited, which, neither at the Time of the Entry of the Claim, nor afterwards, had been ſo ſurveyed, ſuch an Entry before the Court of Seſſion would have been improper; and their Lordſhips would thereby have no Power lodged in them to judge of the Validity of ſuch Claim; becauſe the particular Juriſdiction created in them by that Statute depends upon the Survey of an Eſtate being made as forfeited: But it will by no means follow from thence, either that they cannot judge upon a Claim that was entered before the Survey of an Eſtate which was afterwards truly ſurveyed, or that ſuch a Claim was improperly entered, and therefore falls to be diſmiſſed. And this Argument is the ſtronger in the preſent Caſe, that the Eſtate of *Perth* being firſt ſurveyed as forfeited by the Attainder of the elder Brother *James Drummond*, and the Report of that Survey recorded in the Sheriff-court Books upon the 17th Day of *June* 1748, at a Time when it was believed that *James Drummond* had died before the Day appointed by the Act of Attainder paſſed in the 19th Year of the late King, for the Perſons therein named, whereof *James* and *John Drummonds* were two, their ſurrendering themſelves to Juſtice, under the Pain of being judged guilty of High Treaſon; the Memorialiſt, obſerving that it might be at leaſt doubtful, whether *James Drummond* was attainted of High Treaſon or not, properly entered his Claim, as having Right to the Lands there-

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in mentioned through the Attainder either of *James* or *John Drummond*; and that it is believed it will be admitted, on the Part of his Majeſty's Advocate, that the ſecond Survey was no more than a mere Tranſcript of the firſt; ſo that it could not poſſibly occur to the Memorialiſt, that it was neceſſary for him to enter a new Claim in theſe Circumſtances.

As to the *ſecond* Point, which the Court has chiefly ordered Memorials upon; the Duke of *Athol* does not contend, that *John Drummond*, the forfeiting Perſon, was, at the Time of his Attainder, in ſuch a Manner his Vaſſal, that he had made up a feudal Title to the Lands claimed by him; and that he, in that Senſe, held theſe Lands of him. He admits, that *James Drummond* was the laſt Perſon, before the Forfeiture, that had the feudal Property of theſe Lands in him. But if he ſhall be able to ſatisfy the Court, 1*ſt*, That the Benefit of the Clan-act applies equally to Vaſſals, who ſhall happen to be forfeited while in a State of Apparency to their Predeceſſors, as to thoſe whoſe Titles were properly made up to theſe Eſtates; and, 2*dly*, That, at the Time of the Forfeiture of *John Drummond*, he was Heir-apparent in the Eſtate of *Perth* to his elder Brother *James*, whoſe Succeſſion had then legally devolved upon him; he hopes the Court will ſee ſufficient Cauſe to repel this Objection made to the preſent Claim.

With regard to the *firſt* of theſe Propoſitions: As the View of the Clan-act, in that reſpect, is to give forfeited Superiorities to loyal Vaſſals, and forfeited Properties to loyal Superiors, the Memorialiſt cannot conceive, that ever the Legiſlature could intend to make a Diſtinction with reſpect either to Superiors or Vaſſals, betwixt ſuch in whom the Eſtates were properly veſted, and ſuch who only ſtood in a ſtate of Apparency. He cannot perſuade himſelf, that if a loyal Vaſſal were claiming the Benefit of this Act againſt his Superior, as forfeited for his Acceſſion to the late Rebellion, that the Crown, of whom it ſhall be ſuppoſed the Rebel's Eſtate held, could maintain this Plea, That the forfeiting Perſon had never made up his

his Titles to the Eſtate; and therefore he was not properly the Superior of the Vaſſal claiming. And as little, in the Memorialiſt's Apprehenſion, could it be maintained againſt a loyal Superior claiming the Property of a Rebel-vaſſal's Eſtate upon this Act, That the Vaſſal had never made up his Titles to that Property, but was only apparent Heir therein. The Benefit of this Act, according to the very Title thereof, is for encouraging Superiors and Vaſſals to remain loyal: And they ſeem to merit that Benefit equally, when they themſelves remain loyal, whether the forfeiting Perſons had, at the Time of the Forfeiture, made up a Feudal Title to their Eſtates, or were only apparent Heirs therein. Beſides, as there is no doubt, that an apparent Heir forfeits an Eſtate to the Crown for Treaſon, as much as if he had been duly veſted therein; and that the Intention of that Statute is, in certain Caſes, to give the Benefit of a Forfeiture to Perſons remaining loyal; there ſeems to be no Reaſon, why that Benefit ſhould be confined only to Caſes where Superiors and Vaſſals had the Feudal Right to their Eſtates eſtabliſhed in them.

And as this is the plain Meaning of the Statute, there appears nothing in the Words thereof to contradict ſuch a Conſtruction; the natural Meaning of *holding Lands or Tenements*, which are the Words there uſed, applying to apparent Heirs in Lands and Tenements ſo held, as well as to Superiors and Vaſſals who had eſtabliſhed in their Perſons a complete Right thereto.

To apply this to the preſent Caſe: The Memorialiſt ſaw both the Brothers, *James* and *John Drummonds*, engaged in the late Rebellion. He, as in Duty bound, continued loyal to his late Majeſty. He claimed the Property of the Lands held of himſelf, through the Attainder of either *James* or *John*. Had *James* been found forfeited, as the Property of theſe Lands was completely eſtabliſhed in him by Infeftment, held of the Memorialiſt, his Claim, under the Clan-act, muſt have been ſuſtained; and for what Reaſon he falls to be deprived of that Benefit, becauſe *James* died before the Day appointed for his ſur-

rendering himſelf to Juſtice, whereupon the Eſtate devolved upon *John*, by whoſe Attainder it was found forfeited, is not eaſy to conceive.

With regard to the other Propoſition above mentioned, That upon the Death of *James Drummond*, the Right to ſucceed in the Eſtate of *Perth* legally devolved upon *John*; that ſeems entirely to depend upon this Queſtion, Whether, upon the 11th Day of *May* 1746, when *James Drummond* is proved to have died, the Right to ſucceed in the Eſtate of *Perth*, and conſequently to the Property of the Lands now claimed, legally devolved upon *John Drummond* his Brother? or, if he was cut out from all Title or Intereſt therein in virtue of the preceding Act of Parliament, whereby he was attainted of High Treaſon, from the 18th of *April* 1746, unleſs he ſhould render himſelf to Juſtice on or before the 12th of *July* following? which he never did. And that, notwithſtanding of that Act of Attainder, the Succeſſion to the Eſtate of *Perth* did devolve upon *John Drummond*, the Memorialiſt apprehends is already determined, both by the Court of Seſſion and by the Houſe of Lords, in the Courſe of the Claim that was entered for the Property of the Eſtate of *Perth* by *Thomas Drummond* of *Logiealmond*: For there the Lords will pleaſe remember, that it was greatly inſiſted on for that Claimant, That the Eſtate of *Perth* was not forfeited through the Attainder of *John Drummond*, in regard his Blood was attainted upon the 18th of *April* 1746, he not having rendered himſelf to Juſtice before the 12th of *July* following; upon which Suppoſal very great Authorities were quoted from the *Engliſh* Law-books, to ſhow that the Law ſtood ſo; particularly the following Quotation, *Cook*, *1ſt Inſt. cap.* 1. § 4. "The Father is ſeiſed of Land in Fee, holden of *J. C.*; "the Son is attainted of High Treaſon; the Father dieth; "the Lands ſhall eſcheat to *J. C. propter defectum ſanguinis*; "ſo that the Father died without Heir, and the King cannot "have the Land, becauſe the Son never had any Thing to "forfeit." And another Quotation from *Hales*'s Pleas of the Crown,

Crown, *part* 1. *chap.* 27. *p.* 356. whoſe Words are: "In caſe "of collateral Deſcents of Fee-ſimple, if there be Father and "two Sons, and the eldeſt is attainted in the Life of the Fa- "ther, and dies without Iſſue in the Life of the Father, the "younger Son ſhall inherit the Father; for he needs not men- "tion his elder Brother in the conveying his Title: But if the "elder Son attainted ſurvive the Father but a Day, and die "without Iſſue, the ſecond Son cannot inherit, but the Lands "ſhall eſcheat, *pro defectu heredis*, for the Corruption of "Blood in the elder Son ſurviving the Father, impedes the "Deſcent." Whereupon the Court, upon the 1ſt *December* 1750, found, "That *John Drummond*, ſecond Son to the late "Lord *Drummond*, now attainted of High Treaſon, was, up- "on 11th *May* 1746, when *James Drummond* his eldeſt Bro- "ther died, capable to take by Deſcent from his ſaid elder "Brother, and that the Eſtate of *Drummond* in queſtion did "then deſcend, by *James*'s Death, to *John Drummond* now at- "tainted, and was forfeitable and forfeited by the Treaſon "and Attainder of the ſaid *John Drummond*." Which Judg- ment having come under the Review of the Houſe of Lords, the ſame was affirmed by their Lordſhips. After, upon the following Queſtion being put to the Judges, "Whether, by the "Law of *England*, *John Drummond*, ſecond Son of the late "Lord *Drummond*, was, on the 11th *May* 1746, capable of "taking Lands by Deſcent? and, Whether, by his not ren- "dering himſelf to Juſtice, on or before the 12th *July* 1746, "according to the Act of the 19th Year of his then Majeſty, "ſuch Deſcent became diveſted or void?" the Lord Chief Ba- ron of the Court of Exchequer declared, "That it was the un- "animous Opinion of the Judges, that he was capable; and "conſequently ſuch Deſcent became void by his not rendering "himſelf to Juſtice."

The Memorialiſt hopes, that it is of very little Moment, in this Caſe, that the Rebellion, which begun in the Year 1745,

was ſuppreſſed before *James Drummond* died; ſince, he apprehends, it is ſufficient for his Purpoſe, if, from the Time of the Death of *James Drummond* to the Time of the Attainder of *John Drummond*, which, in conſiſtency with the Judgment both of this Court and that of the Houſe of Lords, can only be conſidered to take Effect upon the 12th *July* 1746, he was capable to hold the Lands now claimed as a Part of the Eſtate of *Perth*.

As to the *third* Objection; the Memorialiſt begs Leave only to add a few Words to what is contained in the former Information for him on this Head; which are, "That as, by the "Veſting-act, all and every Sequeſtration, Suſpenſion, Arreſt-"ment, and other Act and Decree, made and paſſed in any "Court and Judicature, ſince the 1ſt Day of *Auguſt* 1745, or "which ſhould thereafter be made or paſſed, otherwiſe than "according to the Directions of that Act, whereby any Right, "Title, Charge, or Intereſt, in, to, out of, or upon, any of "the ſaid forfeited Eſtates, hath been, or ſhall be decided or "determined in favour of any Creditor, or Perſon claiming In-"tereſt therein, or whereby any Perſon or Perſons have been "or ſhall be intitled to poſſeſs any Part of the ſaid Eſtates, "real or perſonal, or to levy, receive, or diſcharge, any Part "of the Rents and Profits of the ſame, by any ſuch Decrees "or Sentences, or without any lawful Title, are declared to "be void and null." It does not occur to the Memorialiſt, what Method he could poſſibly have taken to attain Poſſeſſion of the Lands now claimed by him, other than he has done. For as to Infeftment therein, he had no Occaſion for the ſame, the Property being conſolidate with the Superiority, by the Operation of the Statute. *John Drummond* could only be conſidered as convicted of High-Treaſon upon the 12th *July* 1746. The Veſting-act paſſed a few Months after, directing the only Manner in which a Claim of this Kind could be made effectual. Such Claim was duly entered in proper Time. And the

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Memorialiſt can very well account why that Claim has not hitherto been determined, thus. 1*ſt*, That as there is a ſimilar Caſe depending, which has been carried to the Houſe of Lords by Appeal, it ſeemed very proper to delay the Determination of this, and all of the ſame Sort, till the Event of that Appeal. Which Delay was inſiſted on by the Lord Advocate, and granted, in another Claim of the ſame Kind, by the Memorialiſt, for the Property of a Part of the Eſtate of *Lochgary*. And, 2*dly*, That there have been Communings betwixt the Officers of the Crown and the Memorialiſt, and others in the ſame Situation, for yielding all Claims upon the Clan-act, for a valuable Conſideration. But as, at the former adviſing of this Cauſe, the Court was generally of Opinion, that the firſt and third Objections ought to be over-ruled, and deſiderated only on the ſecond Objection, the Memorialiſt will not offer any Thing further on the firſt and third Points, and has applied himſelf chiefly to remove the Difficulties on the ſecond Point; hoping that what he has offered on that Head will be ſatisfactory.

In reſpect whereof, it is hoped the Court will ſuſtain the Memorialiſt's Claim, and repell the ſeveral Objections made thereto.

DA. GRÆME.